APPEAL NO. 93722

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held in (city), Texas on July 20, (year), before hearing officer (hearing officer). In response to the three issues before him, the hearing officer determined that the appellant, hereinafter claimant, was not injured in the course and scope of his employment on (date of injury); that he did not timely notify his employer of his injury and failed to show good cause for such failure to timely notify; and that he does not have disability. The claimant appeals the hearing officer's decision, specifically alleging error in the supporting findings of fact and conclusions of law. The respondent, hereinafter carrier, seeks our affirmance of the decision below.

DECISION

We affirm the decision and order of the hearing officer.

The claimant, who was employed as a driver by (employer), was involved in a motor vehicle accident on (date of injury), when the delivery truck he was driving skidded on an icy road and overturned. The claimant said he fell to the passenger's side of the truck, whose window broke, and that he hit the ground. However, he said that although he felt "bumped and bruised" and scared at the time, he told his employer that he did not believe he was injured and did not feel a need to see a doctor. A report filed by the county sheriff's office summarized the accident and stated that there were no injuries.

Following the accident the claimant continued to work for the next three months at his job, which involved loading and unloading the truck in addition to driving. On Saturday, (date of injury), while at home, he sat down and felt pain in his leg; he went to a hospital emergency room the following day from which he was discharged, with pain medication. Claimant's wife called his supervisor, (Mr. L), to say claimant could not work because he had a pinched nerve. On (date), still at home, he again felt pain, fell to the floor, and was taken by ambulance to the emergency room. There he saw Dr. LG) who performed tests and diagnosed a ruptured disk. The claimant said Dr. LG wanted to perform a lumbar laminectomy immediately; that the two of them discussed the possible need for a second opinion but that Dr. LG did not want to wait. The claimant's surgery was performed on (month) 29th. As of the date of the hearing, he had not been released to return to work, nor had he worked since (month) 25th.

The claimant said, and the medical records reflect, that he told Dr. LG about the January accident and that he informed Mr. L he wasn't sure whether his injury was a result of the accident or not. He said that not until Dr. LG's letter of June 3rd did the doctor definitively relate his condition to the accident. Dr. LG wrote, "I feel that his back injury with large extruded L2-3 disc requiring a left L2-3 laminectomy in (month) (year) was secondary to the truck injury in January (year) . . . There may have been some element of repetitive injury since he does drive a truck and truck drivers are prone to lumbar disc problems but I feel that the main reason for his extruded disc was the wreck."

Mr. L, who is claimant's supervisor, testified that he asked claimant if he was all right after the January accident, and claimant told him he was only scared. He said that while employer sends injured workers to a clinic, they do not mandate medical attention if the employee says he is not hurt and there are no visible signs of injury. He said he observed claimant at work perhaps three to four times a week during the three month period following the accident, and that he saw no indication that claimant was injured. As an example, he said drivers were furnished ladders with which to get in and out of the truck, but that claimant "jumped in and out of the truck." He also testified, and employer's records indicated, that claimant's productivity (in terms of cases per hour delivered) actually increased during the period between January and (month) (year). Claimant contended that he kept his productivity high because of his need to work, and the financial incentive that accompanied productivity above a stated amount. Mr. L said that a driver could be fired if his productivity fell drastically, such as to 50 cases per hour, but that claimant's amount had risen from more than 90 cases to more than 100.

Claimant testified that although there were times he had pain he had not reported an injury in part because of his concerns about losing his job. He said that drivers could be fired if they exceeded a certain number of accidents; in addition, he had had a prior compensable back strain which he had reported in December 1991. Mr. L testified, however, that employees could potentially be terminated for three chargeable (due to driver's fault) accidents within one year; he said claimant had had one previous chargeable accident but that this one was determined to be non-chargeable.

With regard to notice, Mr. L said claimant never told him during the January - (month) period that his back was hurting. He said that when claimant telephoned him on to tell him about the injury, claimant said it must have been caused by the accident, and that it "couldn't have been anything that happened at the lake." The claimant testified that about two weeks before experiencing pain on (date of injury), he had gone to a lake to test drive a boat, which he ultimately purchased.

(Mr. S), a lead driver for employer, testified that on the day of the accident claimant told him he had bumped his knee on the gear shift, but that otherwise he was just scared. Mr. S said he saw claimant several times a week thereafter, that claimant never complained that his back was hurting, that he had seen claimant use the ladder on occasion and at other times jump down from the truck, and that he had also on occasion seen claimant carry cargo from one truck to another. He said he had seen claimant working Friday, (month), and he was surprised when he heard, on the following Monday, that claimant had had a back injury.

Our review of the record discloses sufficient evidence upon which to affirm the hearing officer's determination that the claimant did not suffer an injury in the course and scope of his employment. Despite uncontroverted evidence that claimant was involved in an accident on January 11th, his own statements and actions in the months to follow belied the fact that he had suffered a herniated disc from that event. Claimant by his own admission continued to work, at high levels of productivity, and his supervisor and co-worker testified that they had no indication that he had been injured. It is true, as the evidence

shows, that claimant told both the emergency room personnel and Dr. LG about the motor vehicle accident, and that Dr. LG subsequently opined that that was the cause of the herniation. However, this presented a conflict in the evidence which the hearing officer as fact finder was entitled to resolve. Ashcraft v. United Supermarkets, Inc., 758 S.W.2d 375 (Tex. App.-Amarillo 1988, writ denied). The 1989 Act provides that the hearing officer is sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165(a). Despite the fact that the evidence also could have supported a different conclusion, that alone is insufficient reason to reverse the hearing officer's decision Texas Workers' Compensation Commission Appeal No. 92113, decided May 7, 1992. Only were we to determine that the hearing officer's findings were so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust would we set aside such decision. In re King's Estate, 244 S.W.2d 660.

Because the hearing officer, as we have determined, did not err in his decision on the issue of injury, we do not need to review his determination that claimant did not have disability. Disability, by definition, can only exist where a claimant had a compensable injury. Section 401.011(16). Because of our affirmance we also do not need to address the hearing officer's determination that claimant neither timely notified his employer nor had good cause for failure to do so. We would note that this panel has previously addressed the issue of notice in a similar case in which an accident was observed by the employer, but injury was denied by the employee at the time of the accident. Texas Workers' Compensation Commission Appeal No. 93550, decided August 12, (year). While we found the evidence sufficient in that case to support the hearing officer's determination that the claimant had good cause for failure to timely notify her employer, we noted that in certain circumstances actual knowledge could be imputed to the employer where an accident was witnessed, citing Miller v. Texas Employers Insurance Association, 488 S.W.2d 489 (Tex. Civ. App.-Beaumont 1972, writ ref'd n.r.e.). As we concluded in that case, however, the issue of notice will always, absent "spectacular injuries," Id. at 492, be a question of fact for the hearing officer.

The decision and order of the hearing officer are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge